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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 555

NORTHERN INDIANA PUBLIC SERVICE COMPANY,
Petitioner,
(Defendant-Appellant),

vs.

HERLIHY MID-CONTINENT COMPANY,
Respondent,
(Plaintiff-Appellee).

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondent respectfully submits that petitioner has failed to advance any special and important reasons why this Court should grant the writ. The Court of Appeals did not decide an important state question, nor sanction any departure from the accepted and usual course of judicial proceedings.

The Questions Petitioner Presents for Review.

Contrary to petitioner's assertion, the judgment is not *based* on erroneously admitted evidence. The trial judge, hearing the case without a jury, admitted some evidence concerning other contracts. The Court of Appeals held such evidence was *res inter alios* and that the trial court was in error in allowing it to be introduced, but concluded there was sufficient competent evidence to sustain the

decision of the trial court and affirmed the judgment. It is perfectly clear from the Findings of Fact and Conclusions of Law of the trial judge and the opinion of the Court of Appeals that the judgment is not based on the erroneously admitted evidence, but upon a construction of the language of the contracts between the parties.

The second question presented for review by petitioner is that the Court of Appeals construed the Indiana Gross Income Tax "as a sort of a privilege tax in the nature of an occupation or sales tax." The Court of Appeals did not so construe the Indiana law, but unequivocally stated that "we are dealing with a privilege tax upon the receipt of gross income as distinguished from a tax on property. See *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307; *Gross Income Tax Division* v. *Strauss*, 226 Ind. 329, 79 N.E. 2d 103" (Pet., p. 25).

Contending that the Court of Appeals' holding is in direct conflict with an applicable decision of the Indiana Supreme Court, the petitioner cites *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138. All the Indiana Court decided in that case, pertinent to petitioner's contention, was under an oral *cost-plus* construction contract wherein, as the Court there pointed out, *costs* of the contractor were not defined, the Indiana Gross Income Tax would be treated as *overhead* of the contractor. The Court of Appeals in this case analyzed that decision and properly held it inapplicable to the facts in this case, because the parties here by the terms of their contracts included the Indiana Gross Income Tax within the scope of operating costs (Pet., p. 26).

The final question Petitioner presents for review is that the Court of Appeals overruled one of its own decisions as well as decisions of the Indiana courts. The de-

cisions petitioner refers to passed upon claims of lessors that their lessees were obligated to pay the lessors' Federal income taxes on rents received. The lease provisions involved in those cases are so unlike the contract terms in this case, the Court of Appeals, properly, did not see fit to discuss them in its opinion.

Restatement of the Case.

Omissions and inaccuracies in petitioner's Statement of the Case make it advisable to set forth the following facts.

The respondent sought and recovered only the Indiana Gross Income taxes it paid on the moneys respondent received from the petitioner in reimbursement of costs respondent actually expended for petitioner in performing the contracts (Fdg. 9, Pet., p. 33).

All of the contracts between respondent and petitioner were prepared and drawn by an engineering firm employed by the petitioner, pursuant to a written agreement between petitioner and the engineering firm. In accordance therewith, the engineering firm prepared the contracts, the drawings and specifications, and issued certificates for payments to the respondent as the contractor. The contracts between petitioner and respondent specifically provided that this engineering firm should interpret the contracts (App. 3, 10, 29, 44, 62, 71, 76, 20).

In the provision requiring the petitioner to pay respondent as part of the latter's costs the amounts required by any Federal, State or local taxes applicable to the Work, the word "Work" designedly begins with a capital W. The term "Work" is defined in the contracts and as defined is all embracive, meaning, as the Court of Appeals found, the entire performance of the contracts (App. 20; Pet., pgs. 25, 26).

The contracts defined respondent's *overhead*, as well as the costs for which respondent would be reimbursed, which costs as defined expressly included any Federal, state or local taxes applicable to the "Work". The paragraph of the contracts defining respondent's *overhead*, for which it would not be reimbursed, did not include the Indiana Gross Income Tax or any language to that effect (Fdg. 8, Pet., pgs. 32, 33).

There were numerous contracts entered into by petitioner with others to supply machinery and equipment for the same construction job. These contracts with manufacturers were printed and provided generally for the payment of taxes by the petitioner. Insertions or notations, at petitioner's direction, were made by the engineering firm on the contracts with the manufacturers to exclude payment by petitioner of the Indiana Gross Income Tax (App. 91-101). No insertions or notations of any kind were ever made on the contracts between respondent and petitioner to exclude the Indiana Gross Income Tax (App. 102, 103; Pet.'s Exs. A, B, C and D; App. 10-47).

A partner of the engineering firm employed by petitioner which drew the contracts in question between petitioner and respondent testified that at the time the contracts were drafted and executed by petitioner and respondent he knew that there was an Indiana Gross Income Tax and that there was not any other State of Indiana tax that he knew of that respondent might be liable for in performing the contracts (App. 91). The president of petitioner, who personally read and signed the contracts on behalf of the petitioner, likewise testified he was conscious of the Indiana Gross Income Tax when he signed the contracts, and he in effect admitted that he knew of no Indiana tax other than Indiana's gross income tax which could come within the meaning of the words "state

taxes applicable to the work" (App. 286-289), which were the taxes petitioner agreed to pay respondent as part of the costs.

After construction was commenced by respondent, it sent bills or invoices monthly. Initially, these invoices included a charge for the Indiana Gross Income Tax. These invoices which included such tax charges were sent to the petitioner at the site of construction, where they were examined and tentatively approved by the petitioner. They were then forwarded by the petitioner to its engineering firm, which was expressly authorized in writing by petitioner to interpret the contracts between it and respondent. The engineering firm checked the invoices and certified them for payment, including the Indiana Gross Income taxes therein charged. So certified by the engineering firm, the invoices were sent to the principal office of the petitioner, where, in the purchasing department, the items for the Indiana Gross Income Tax were stricken out in pen and ink. Petitioner would not pay any bill which included among undisputed items an item it disputed (App. 218, 219, 220, 261; Fdg. 6, Pet., pgs. 31, 32).

The alleged conversations employees of petitioner testified they had with the president of the respondent, who died shortly before the trial, which are detailed at pages 7 and 9 of the petition, were refuted by a certified public accountant who at the time of the alleged conversations employed by the respondent (App. 154-156). Moreover, the correspondence that passed between the petitioner and the respondent and their lawyers, upon the payment of the last invoice of the respondent (accepted by agreement as being without prejudice to respondent's claim for the Indiana Gross Income taxes) conclusively belies

the alleged conversations with which petitioner unfairly burdened this Court in its petition (Respondent's Exs. 16, 17, 18; App. 249-253). Furthermore, in its answer in the trial court, petitioner did not plead that the respondent had waived its claim (App. 1). The trial judge found that the respondent never withdrew or waived its claim against the petitioner for the payment of the taxes (Fdg. 6, Pet., p. 32), and the Court of Appeals in its opinion refused, "after examination of the entire record," to disturb that finding (Pet., p. 26).

Regulation 404 issued under the Indiana Gross Income Tax Law authorized shifting the burden of the tax from the respondent to the petitioner by contractual agreement (Fdg. 10, Pet., pgs. 33, 24, 25).

ARGUMENT.

The Court of Appeals did not sanction any departure from the accepted and usual course of judicial proceedings.

There was no departure in this case from the accepted and usual course of judicial proceedings. The judgment is not based upon the theory that the Indiana Gross Income Tax is a tax upon the work under contracts, as petitioner contends. In its opinion, the Court of Appeals expressly stated, "We are dealing with a privilege tax upon the receipt of gross income" (Pet., p. 25).

The courts below construed *the tax provisions of the contracts,* not the Indiana Gross Income Tax law, as requiring the petitioner to repay the respondent the Indiana Gross Income Tax imposed upon the receipt by respondent of the costs it advanced in petitioner's behalf in the performance of the contracts. The Indiana Gross Income Tax Law imposed the tax upon "all funds received for the performance of contracts" (Burns Ind. Stats., Sec. 64-2603). It is now, and has been throughout this litigation, the theory of the petitioner that the respondent should be reimbursed for the costs expended in petitioner's behalf, *less the tax,* despite the provisions of the contracts. Petitioner seeks to defend that position in this Court, yet does not even challenge or dispute the Court of Appeals' reasoned interpretation of the meaning of the tax provisions of the contracts between the parties.

The Court of Appeals, as well as the trial court, held that under the provisions of the contracts petitioner had agreed to reimburse respondent for the taxes imposed upon the reimbursed costs and that this was authorized by

Regulation 404 issued under the Indiana Gross Income Tax Law, which allows shifting the tax from the recipient of the gross income to the party who pays it (Fdg. 10, Pet., pgs. 33, 24, 25). A regulation of a department of a state government charged with the enforcement of a statute, has the force and effect of law (*Maryland Casualty Co.* v. *United States,* 251 U.S. 342, 40 S. Ct. 155, 64 L. Ed. 297, 302).

In a further effort to convince this Court there was a departure from the accepted and usual course of judicial proceedings, the petitioner contends that the judgment is *based* on erroneously admitted evidence (Pet., p. 3) and that, in determining the litigation adversely to the petitioner, the trial court relied on other contracts respondent had with Chicago District Electric Generating Corporation (Pet., p. 11). This is not true.

While conceding that the Court of Appeals held that the admission of such evidence was erroneous, the petitioner seeks this Court's review upon the ground that the admission of the evidence was *reversible* error. Petitioner's wholly unwarranted assertion that the trial court *based* its judgment upon the erroneously admitted evidence of respondent's contracts with Chicago District Electric Generating Corporation is belied by a reading of all the Findings of Fact (Pet., pgs. 29-33) and particularly by the Conclusions of Law (Pet., pgs. 34, 35). Findings 9 and 10 (Pet., p. 33) and Conclusion of Law 6 (Pet., p. 35) clearly show that the trial court based its judgment on a construction on the provisions of the contracts. The opinion of the Court of Appeals manifests that it affirmed the judgment for that reason (Pet., pgs. 25, 26).

The fact is, demonstrated by the record, the erroneously admitted evidence was not offered and received as *binding*

upon the petitioner but merely to show what was in the mind of respondent when the contracts between it and the petitioner were executed. The same engineering firm which was the agent of petitioner in drafting, supervising the performance of and in certifying payments under the contracts between petitioner and respondent acted in a similar capacity under current net-costs' contracts between respondent and Chicago District Electric Generating Corporation, whereunder respondent was being paid the Indiana Gross Income Tax imposed on its reimbursed costs. Upon the trial of this case, when counsel for respondent offered the evidence concerning the contracts with Chicago District Electric Generating Corporation, because of the dual position of petitioner's engineering firm, he repeatedly stated that such evidence was not offered *as binding upon petitioner* but was introduced in order that the trial judge might place himself in the situation of the parties to determine what was in the mind of respondent with reference to the tax provisions of the contracts between it and petitioner when the contracts were executed (App. 84, 88). Under such circumstances, it is difficult to understand petitioner's repeated assertion that the trial judge based the judgment upon such evidence in view of respondent's expressed position that the evidence was not binding upon the petitioner.

It is significant that in his findings the trial judge merely recited the erroneously admitted evidence. He made no conclusions of ultimate fact or of law therefrom (Pet., pgs. 29-35), his determination and judgment being based upon a construction of the contracts between petitioner and respondent.

Stripped of its obviously designed circumventions, in reality, the proposition petitioner urges is that if er-

roneously admitted evidence is recited in a finding of fact, *ipso facto*, the error in admitting such evidence is reversible error. Rejection of that proposition by the Court of Appeals is the basis of petitioner's claim that it sanctioned a departure in this case from the accepted and usual course of judicial proceedings.

Where a case is tried before the court without a jury and in his findings of fact the trial judge recites erroneously admitted evidence, the error is not reversible if, as here, there is other competent evidence to sustain the judgment (Rule 61, Federal Rules of Civil Procedure; *Mammoth Mining Co.* v. *Salt Lake Foundry & Machine Co.*, 151 U.S. 447, 14 S. Ct. 384; *Ruckman* v. *Cory*, 129 U. S. 387, 9 S. Ct. 316; *Parker* v. *Title & Trust Company*, 233 F. 2d 505, 513; *Particelli* v. *Commissioner of Internal Revenue*, 212 F. 2d 498, 502; *Thompson* v. *Baltimore & O. R. Co.*, 155 F. 2d 767, 771; *Bommarito* v. *Southern Canning Co.*, 209 F. 2d 56, 61; *Green* v. *Dingman*, 234 F. 2d 547, 552, 553).

The authorities cited by the petitioner as being persuasive that the inclusion of erroneously admitted evidence in the finding makes the error reversible, have no application. In *City of Chicago* v. *Greer*, 76 U.S. 726, 19 L. Ed. 769, the trial was by jury and evidence of other contracts was offered but excluded on the trial. The opinion of this Court upheld that ruling. In *Builders Steel Company* v. *C. I. R.*, 179 F. 2d 377, a review of a decision of the Tax Court, the issue was whether compensation paid to corporate officers was reasonable. The Tax Court had refused to admit competent evidence as to the reasonableness and worth of the officers' services. The reversal by the Court of Appeals was for *exclusion* of competent and material evidence upon the very issue to be determined. Significantly, the Court of Appeals in

that very case said it was virtually impossible in the trial of a non-jury case for the trial judge to commit reversible error by receiving incompetent evidence. The remaining case upon which petitioner relies is *Freightways, Inc.* v. *Stafford*, 217 F. 2d 831. In that case the judgment of the trial court was reversed and the cause remanded because the findings of fact were in irreconcilable conflict on material issues and there was no substantial evidence to sustain the judgment.

The Court of Appeals gave due consideration to the position the petitioner advances in this Court and cited numerous cases upholding its determination that the error in the admission of the evidence concerning other contracts was not reversible (Pet., p. 28).

The Decision of the Court of Appeals is not in conflict with applicable Indiana law.

In its final endeavor to have this Court review the record in this case, petitioner repeats its declaration that, "The Court of Appeals construes the Indiana Gross Income Tax as a sort of privilege tax in the nature of an occupation or sales tax". The Court of Appeals in its opinion unequivocally stated that the tax is a privilege tax upon the receipt of gross income (Pet., p. 25); which is in complete accord with the decision of this Court in *J. D. Adams Manufacturing Co.* v. *Storen*, 304 U.S. 307, 58 S. Ct. 913, rather that "in irreconcilable conflict," as petitioner contends.

Petitioner confuses construction of the Indiana Gross Income Tax law with the Court of Appeals construction of the contracts. In such confusion, petitioner omits what the Court of Appeals specifically pointed out, that the term "Work" in the phrase "any state taxes applicable

to the Work" was so defined in other provisions of the contracts as to mean the entire performance of the construction contracts. Consequently, the Court of Appeals concluded that the phrase "any state taxes applicable to the Work" meant any state tax which was required to be borne by the respondent in connection with or as a result of the performance of the entire contracts. As the respondent was required to advance the costs of construction, which upon reimbursement were subjected to taxation under the Indiana Gross Income Tax Law, the tax upon the reimbursed costs was required to be borne in connection with and as a result of the performance of the contracts.

The Court of Appeals did not misconstrue the Indiana Gross Income Tax Law. Petitioner misconstrues the Court's opinion. In determining that the Indiana Gross Income Tax was a tax applicable to the performance of the entire contracts *under the contract provisions*, the Court of Appeals did not thereby hold that the Indiana Gross Income Tax was a tax imposed upon work (in the ordinary sense). Petitioner argues as if the tax clause in the contracts provided that the petitioner would only reimburse the respondent for any state tax imposed upon the work done under the contract, but petitioner, whose agent drew the contracts, therein agreed to reimburse respondent for any state tax *applicable* to the entire performance of the contracts. Applicable means relevant; and it is perfectly clear that the taxes paid by respondent were related to the performance by it of the contracts. If the respondent had not performed the contracts, it would not have had to pay the tax. Manifestly, then, the taxes in question were applicable or relevant to the performance of the contracts.

The second contention of petitioner that the Court of Appeals decided important state questions in conflict with Indiana law is based on petitioner's misconstruction of the opinion in *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138. While conceding that the Indiana court in its opinion in that case pointed out that it was dealing with an oral contract in which the contractor and the owner did *not* define costs, the petitioner gratuitously asserts *that* is a distinction without a difference, and concludes that the decision in *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138, expressly declares the law of Indiana to be that the Indiana Gross Income Tax is a direct tax upon the contractor and not an operating cost attributable to the work and that a contract between private parties cannot change the nature of the tax. Of course, the Indiana tax is a direct tax upon the contractor and parties to a contract cannot change the *nature* of the tax. But the contractor and the owner for whom the contractor does construction can validly agree that the owner will repay the contractor the Indiana Gross Income Tax imposed upon the reimbursement of the contractor's costs. Regulation 404 issued by the Indiana Department of Revenue under the Indiana Gross Income Tax Law specifically permits such an agreement (Fdg. 10, Pet., p. 33), and the Courts of Indiana have repeatedly recognized that parties are perfectly free to contract contrary to existing law if their contract is not violative of public policy (*National Mill Supply Co.* v. *State*, 211 Ind. 243, 6 N.E. 2nd 543; *Lester* v. *Hinkle*, 90 Ind. App. 193, 153 N.E. 179; *Niederhaus* v. *Jackson, Receiver*, 79 Ind. App. 551, 137 N.E. 623, 624).

As the Court of Appeals expressly stated in its opinion, the holding in *Mann* v. *Schnarr*, 228 Ind. 654, 95 N.E. 2d 138, can have no bearing in this case because the peti-

tioner and respondent included the tax within the scope of the costs for which respondent was to be reimbursed.

The final contention of petitioner is that the Court of Appeals ignored a rule that the burden of the payment of a tax is not shifted from the statutory taxpayer by contractural agreement except by express language and a clear and unmistakable intention to do so. While the decisions cited by the petitioner do not uphold the broad and emphatic statement of such a rule as petitioner declares it, more significant is the assumption by petitioner that the holdings of the cases it cites require that in order to shift a tax by contractual agreement the tax must be specifically named. Petitioner says, "There was no express promise by the petitioner to pay the Indiana Gross Income Tax. A search of the record will disclose that the tax is not mentioned in any of the contracts between the parties" (Pet., p. 17). Petitioner then proceeds to argue that "under these circumstances, the case of *Owen* v. *Fletcher Savings & Trust Building Co.*, 99 Ind. App. 365, 189 N.E. 173, is controlling" (Pet., p. 18). That Indiana case did not hold, directly or indirectly, that to shift a tax by contractual agreement the tax had to be specifically named, and the language of the opinion indicates the contrary. In that case, a lessor sought recovery from the lessee of Federal income taxes the lessor paid upon the rentals received under the lease. The clause upon which lessor relied provided the lessee would pay any Federal, State and local taxes assessed on the real estate demised or upon the *right* of the lessor to receive rentals under the lease. As appears from the portion of the Indiana court's opinion quoted in the petition for certiorari in this case, the Indiana court refused to expand the meaning of the clause "assessed upon the right of the lessor to receive the rentals" to include the payment by

the lessee of taxes upon the personal income of the lessor (Pet., p. 19).

The remaining case cited by petitioner is *Illinois Central* v. *Indianapolis Union P. Co.*, 6 F. 2d 830, which petitioner asserts the Court of Appeals, by silence, overruled. In that case, the Court of Appeals of the 7th Cir. had before it the claim of a lessor for payment by the lessee of Federal income taxes. The lessor relied upon a provision of the lease that the lessee would pay lessor all expenses growing out of maintenance, operation, renewal and replacement of each railroad system, including taxes. The Court of Appeals concluded that there were no words or phrases from which it might be *inferred* that the tenant railroad undertook to pay any tax assessed upon the rent itself once it came into the hands of the lessor.

Such cases involving claims for recovery of Federal Income taxes have no application to this case. Unlike the Indiana Gross Income Tax, the Federal income tax is not a privilege but a tax on net income derived from all sources (*Keasby & Mattison Co.* v. *Rothensies* (C.C.A. Pa.), 133 F. 2d 895, 897; *Franklin* v. *Peterson, et al.*, 87 Cal. App. 2d 727, 197 P. 2d 788, 792; *Davis* v. *Ogden City; et al.*, 117 Utah 315, 215 P. 2d 616; *Cooley, The Law of Taxation*, Fourth Ed., 1924, Vol. 4, Sec. 1742, p. 3477). "The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden on the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude, and irrespective of whether it is profitable or otherwise" (*United States Glue Co.* v. *Town of*

Oak Creek, 247 U. S. 321, 38 S. Ct. 449, 62 L. Ed. 1135, 1141).

CONCLUSION.

It is respectfully submitted it clearly appears from the record before this Court that the Court of Appeals did not sanction a departure from the accepted and usual course of judicial proceedings and that it did not decide any state questions, important or otherwise, in conflict with applicable Indiana law. The Petition for a Writ of Certiorari was improvidently filed and should be denied.

Respectfully submitted,

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